Supreme Court, U. S.
FILED
MAR 19 1975
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1187

JOSEPH BAXTER, et al.,
PETITIONER,

*v.*

NICHOLAS A. PALMIGIANO,
RESPONDENT.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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# In the Supreme Court of the United States

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No.

JOSEPH BAXTER, et al.,
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NICHOLAS A. PALMIGIANO,
RESPONDENT.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Attorney General of Rhode Island on behalf of the Director of Rhode Island Department of Corrections and several correctional officers, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on December 20, 1974 after having been vacated and remanded by this Court, *Baxter* v. *Palmigiano*, 418 U.S. 908 (1974), for reconsideration in light of this Court's decision in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974).

## Opinion Below

The opinion of the United States Court of Appeals handed down on December 20, 1974 is appended hereto as Appendix "A". The record and all other aspects of this case are contained in this Court's consideration of this petitioner's earlier petition for a writ of certiorari which was granted in *Baxter* v. *Palmigiano*, 418 U.S. 908 (1974).

## Constitutional Provisions

United States Constitution, Articles of Amendment 5, 6, and 14.

## Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered December 20, 1974 and appears as Appendix "A" hereto. We invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

## Statement of Facts

In 1969 a suit brought under 42 U.S.C. § 1983 demanded that Rhode Island afford its convicts a complex system of procedural due process as a condition precedent to disciplinary punishment or rehabilitative classification. Initially resisting change, a progressive administration decided to join the plaintiffs in what it conceived as an experiment. The defendants abated their reservations with the expectation that an unsuccessful experiment, in part or in whole, could be rescued from disaster by an approach to the District Court under Rule 60, F.R.C.P. A Code of prison disciplinary rules was adopted on March 10, 1970, therefore, by agreement. *Morris* v. *Travisono*,



310 F. Supp. 857 (D. RI, 1970). Among other things, these rules provided that convicts, charged by guards with serious rules infractions, were entitled to written notice, lay counsel, and a hearing including confrontation and cross-examination before imposition of punishment. Punishment included loss of "good time" and segregation, under closely defined conditions, for a period not to exceed 30 days. This system operated with great difficulty for three years.

A period of growing instability ensued immediately upon promulgation of the rules. This case was born on the night of November 11, 1972. Nicholas Palmigiano was serving a life sentence for murder in the Rhode Island Adult Correctional Institution. In mid-evening it appeared to Palmigiano that a fellow prisoner was seriously ill. The guards on duty, in view of all the circumstances, and after visiting the convict in question, reacted in orderly fashion. Since the maximum security unit in question imprisons less than two hundred men, help had to be summoned from the nearby Rhode Island General Hospital. A delay ensued. Ten minutes before the nightly lock-up, which did not interfere even slightly with the ensuing medical assistance, appellant allegedly advised other prisoners not to return to their cells for the 9:00 lock-up, in protest against the failure to provide medical attention. At that point guards, following the rules, charged Palmigiano with inciting a disturbance which might have resulted in a riot. *Palmigiano* v. *Baxter*, 487 F.2d 1280, 1281 (1973).

At the ensuing hearing, Palmigiano was allowed to consult with his attorney immediately before entering the hearing room, and was advised by a Deputy Warden that he had the right to remain silent during the hearing. Palmigiano was made aware that his conduct might well be viewed by the Grand Jury as a likely violation of the state's criminal laws. At the hearing Palmigiano had the

assistance of a counsel-substitute, as provided in the rules. There is no question in this case that Palmigiano remained silent except to announce that he would do just that. Palmigiano was disciplined as a result of the hearing.

### Travel of the Case

Palmigiano thereafter filed an action under 42 U.S.C. § 1983 in the United States District Court for Rhode Island. The action alleged solely a deprivation of procedural due process, asserting the invalidity of the "Morris" rules for failure to provide for an appointed or retained attorney at the disciplinary hearing.

The District Judge dismissed the suit after a full hearing on the merits. This judgment was reversed on appeal, the Court of Appeals for the First Circuit holding that "appellant was denied due process in the disciplinary hearing insofar as he was not provided with use immunity for statements he might have made within the disciplinary hearing, and because he was denied access to retained counsel within the hearing." 487 F.2d 1280 (1973). The Attorney General of Rhode Island filed a petition for writ of certiorari to issue to the Circuit Court, which request was granted, 418 U.S. 908 (1974). This Court vacated the judgment in *Palmigiano* v. *Baxter, supra,* and remanded the case to the Circuit Court for reconsideration in light of its decision in *Wolff* v. *McDonnell, supra.*

In its second *Baxter* decision (*Baxter II*), Slip Opinion, Appendix A, the First Circuit held that where "an inmate is called to a disciplinary hearing under the circumstances present here, and is informed that his silence will be used against him, or indeed where his testimony is compelled, use immunity must be provided and the inmate must be so informed." *Slip Opinion, infra,* p. 2. More importantly, the Circuit Court reconsidered its holding that retained counsel be required at disciplinary hearings as follows:



> "We now alter what we said concerning the remaining issue, the right to counsel, confined to a situation where future prosecution is contemplated. *Again the Wolff ruling does not directly apply.* . . . In cases where criminal charges are a realistic possibility, prison authorities should consider whether defense counsel, if requested, should not be let into the disciplinary proceeding, not because *Wolff* requires it in that proceeding, but because *Miranda* requires it in light of future criminal prosecution." *Slip Opinion,* pp. 4-5 (emphasis added).

### Issues Presented

1. Is a prisoner confined under sentence for conviction of a crime by a state court entitled to the presence of defense counsel at a prison disciplinary hearing where his infraction is also a crime under the V, VI and XIV Amendments to the Constitution of the United States?

2. Is a prisoner confined under sentence for conviction of a crime by a state court entitled to "use immunity" at a prison disciplinary hearing if his silence is used against him under the V and XIV Amendments to the Constitution of the United States?

### Reasons for Granting the Writ

#### I. The First Circuit on Remand From This Court Has Failed To Follow *Wolff* v. *McDonnell* With Respect to the Requirement of Counsel at Disciplinary Hearings.

In considering the question of defense counsel at disciplinary hearings, this Court held in *Wolff* as follows:

> "The insertion of counsel into the disciplinary process would inevitably give the proceedings a more

> adversary cast and tend to reduce their utility as a means to further correctional goals. *There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held.* At this stage of the development of these procedures we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings." 418 U.S. at 570. (emphasis added).

The Court made an exception and required lay substitute counsel in highly complex cases or for illiterate inmates.

In making its ruling, this Court was well aware of the conflict of the Circuit courts on this very point. The Court sought to resolve this question as follows:

> "It is our view, however, that the procedures we have now required in prison disciplinary proceedings represent a reasonable accommodation between the interests of the inmates and the needs of the institution.[20]" 418 U.S. at 572.

Footnote 20, significantly, states as follows:

> "[20]The Courts of Appeals, which have ruled on procedures required in prison disciplinary proceedings, have been split . . . As to counsel, two Circuits have held that there is no right, even to lay substitutes, *Braxton* v. *Carlson, supra; Sostre* v. *McGinnis, supra,* while the Third Circuit, *Meyers* v. *Alldredge, supra,* has held that there is no right to counsel where counsel-substitute is provided. The First Circuit, *Baxter* v. *Palmigiano, supra,* holds there is a right to retained counsel, even where a staff-assistant is available, while the Ninth Circuit, *Clutchette* v. *Procunier, supra,*



> envisions some sanctions at disciplinary proceedings calling for provision of counsel, and has determined that counsel must be provided where a prison rule violation may be punishable by state law. . . ." 418 U.S. at 72-73.

Despite the clarity of this holding, and even the citation of the conflicting holdings which are being resolved, the First Circuit stated on the right to counsel issue that "the *Wolff* ruling does not directly apply"! *Slip Opinion,* p. 4. The Circuit Court held in effect that *Miranda* v. *Arizona,* 384 U.S. 436 (1966), requires the presence of counsel at disciplinary hearings whenever criminal charges are a realistic possibility. Since almost all disciplinary hearings involve possession of weapons, drugs, assaults, and matters which can also be subject of criminal prosecution, the practical result is that defense counsel must be present at almost every disciplinary hearing.

## II. The Question Presented in This Petition Is Of Great Importance to Many States Because of the Enormous Administrative Burden of Supplying Defense Counsel at Every Disciplinary Hearing.

Following *Baxter II,* defense counsel have been supplied at every disciplinary hearing. The hearing officer is now over 200 cases behind, whereas before *Baxter II* the backlog never exceeded thirty cases. This Court aptly pointed out that there "would be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held." 418 U.S. at 570. Unless the First Circuit's ruling is reversed by this Court, an impossible administrative burden will completely choke the disciplinary process in many prisons. Furthermore, the holding of the First Circuit makes no sense, since the

counsel who are present take no active part in the disciplinary proceeding, simply advising the inmate before and during the hearing. None of the policies of the exclusionary rule, such as prevention of illegal police behavior, is furthered by the grafting of *Miranda* to the prison disciplinary hearing.

### III. The Decision Below Establishes an Unprecedented Method of Enforcement of Claimed Fifth Amendment Rights by Requiring Non-Judicial Agencies To Accord "Use Immunity" at Prison Disciplinary Hearings Which Immunity Will Later Bind the Courts of This State and of the United States in the Trial of Criminal Prosecutions.

The First Circuit's requirement that use immunity be granted to an inmate in any disciplinary hearing where his silence will be used against him is an impermissible extension of Fifth Amendment rights. The opinion flows from the teaching of *Simmons* v. *United States*, 390 U.S. 377 (1968), which excluded testimony given in a previous suppression hearing. The First Circuit's ruling is contrary to the later teaching of *McGautha* v. *California*, 402 U.S. 183 (1971), where this Court refused to extend *Simmons* because no deterrence of unlawful police behavior would result. Likewise, here, no weakening of the efficacy of the exclusionary rule would follow from a failure to grant use immunity. No policy behind the exclusionary rule will be advanced. The First Circuit has applied the letter of *Simmons*, *supra*, while ignoring its rationale. "Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McGautha*, *supra*, at 212.



### Conclusion

For all the above reasons, your petitioner prays that this Honorable Court grant this Writ of Certiorari directed to the United States Court of Appeals for the First Circuit and that this Honorable Court establish a briefing schedule towards the ultimate determination of this case.

Respectfully submitted,

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APPENDIX A

# United States Court of Appeals
## For the First Circuit

No. 73-1088

NICHOLAS A. PALMIGIANO,
APPELLANT,
*v.*
JOSEPH BAXTER, et al.,
APPELLEES.

ON RECONSIDERATION AFTER REMAND

Before COFFIN, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

*Stephen J. Fortunato, Jr.*, with whom *McKinnon and Fortunato* and *Ellen Katz* were on brief, for appellant.

*Cary J. Coen*, *John M. Roney*, *Max Stern*, *Stern & Shapiro*, and *Stanley A. Bass* on brief for Robert Flint and Michael Roberts, Amici Curiae.

*W. Slater Allen, Jr.*, Assisant Attorney General, with whom *Richard J. Israel*, Attorney General was on brief, for appellee.

December 20, 1974

*Per Curiam*. The Supreme Court vacated the judgments of this court in *Palmigiano* v. *Baxter*, 487 F.2d 1280 (1973), *vacated and remanded*, *Baxter* v. *Palmigiano*, . . . U.S. . . . , 94 S.Ct. 3200 (1974), for reconsideration in light of its decision in *Wolff* v. *McDonnell*, 418 U.S. . . . , 42 U.S.L.W. 5190 (June 26, 1974). We have received memoranda of law from the parties and have reconsidered our prior decision.

We begin by recognizing that the prisoner in this case had been given a number of state-guaranteed procedural rights under the rules promulgated by the Rhode Island



authorities pursuant to *Morris* v. *Travisono*, 310 F.Supp. 857 (D. R.I. 1970). *See Palmigiano, supra*, 487 F.2d at 1285 n. 13 (1973). What was at issue before this court were three additional rights which were claimed on constitutional grounds: the right to remain silent under circumstances where the subject matter of the disciplinary hearing was also a possible basis for criminal prosecution; the right to require the prison disciplinary board to call adverse witnesses; and the right to have retained counsel at the disciplinary hearing. Of these, we rejected the claim that the board should be required to call adverse witnesses and this holding is supported by the Court's judgment in *Wolff* that, so long as the fact finders state the evidence relied on and reasons for disciplinary action, prison officials must have discretion "to refuse to call witnesses that may create risk of reprisal or undermine authority." 42 U.S.L.W. at 5198-99. On the other issues before us, we found constitutionally protected rights and we now reconsider those holdings.

The Court in *Wolff* did not address the issue of the right to remain silent under the circumstances here. *Clutchette* v. *Procunier*, Docket No. 71-2357 (9th Cir. Oct. 21, 1974), opinion on rehearing. In this case, unlike the Ninth Circuit's case in *Clutchette*, the inmate was specifically advised that the facts giving rise to the disciplinary hearing could also lead to state prosecution, that he should consult his lawyer, and that his silence in the disciplinary hearing would be held against him. A finding of disciplinary infraction could lead to segregation. Having reexamined our original opinion, we reaffirm our ruling as to this particular inmate. Where an inmate is called to a disciplinary hearing under the circumstances present here, and is informed that his silence will be used against him, or indeed where his testimony is compelled, use immunity must be provided and the inmate must also be so informed. Our prior directive to expunge appellant's in-prison record of findings and

decisions relating to the alleged infraction and disciplinary board hearing stands.

We are impelled, however, to reconsider our prior position which we thought struck the appropriate balance between needs of the prison authorities to get to the bottom of any prison problems and protection of the inmate who may face state prosecution for the same offense. We held that the authorities could compel a prisoner to testify*, while giving — we thought — full protection to the prisoner in the form of use immunity in any future prosecution, a step which would impose "no burden upon the prison disciplinary hearing". *Palmigiano, supra,* 487 F.2d at 1289.

We now think that we were in error on two counts. In the first place, we too easily applied the right of an inmate to remain silent without his silence being used against him — the issue in this case — to the situation in which no adverse inference is drawn from silence but in which the inmate must choose whether or not to testify to potentially self-incriminating matters in order to rebut or explain facts presented against him at the disciplinary hearing. *Clutchette* v. *Procunier,* 497 F.2d 809, 823, 824 n. 23 (9th Cir. 1974), *vacated and remanded,* . . . . U.S. . . . . , and recently, on this issue, reaffirmed, . . . . F.2d . . . . (No. 71-2357, Oct. 21, 1974). Concededly, the prospect of future criminal prosecution places a prisoner before a disciplinary board in an awkward spot that could make the choice between speaking and remaining silent difficult. But, as we have subsequently held in *Flint* v. *Mullen,* 499 F.2d 100 (1st Cir. 1974), not every adverse consequence which flows from remaining silent can be characterized as an unconstitutional penalty upon the exercise of the privilege against self-incrimination.

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* The treatment of Palmigiano was consistent with the rules established in *Morris, supra.* The hearing rules provides that the "inmate shall admit or deny the charges" and "the Board members may interrogate the inmate . . . . as necessary." 310 F.Supp. at 873.



In the second place, we now realize that allowing prison officials to coerce testimony where they wish by extending immunity has awesome implications. It cheapens the Fifth Amendment. Immunity could be given where it would be scant recompense for the consequences of coerced testimony. There is also the institutional problem. Since prison officials themselves lack the authority to grant immunity, formal judicial proceedings and a full stenographic transcript would be required. Our prior opinion did not take such considerations into account.

While reaffirming our holding as to appellant, we amend our prior opinion by withdrawing our declaration as to a general right on the part of the prison authorities to compel testimony and a general right on the part of inmates to use immunity when they come before a disciplinary board.

We reiterate that the Fifth Amendment privilege against self-incrimination extends to an incarcerated suspect, whether or not interrogation is intended to obtain evidence for further prosecution, *Mathis* v. *United States,* 391 U.S. 1 (1968). An inmate subjected to such interrogation is entitled to be advised of his right to remain silent, and cannot be further interrogated should he choose not to speak. His silence may not be used against him at that time or in future proceedings. *Lefkowitz* v. *Turley,* 414 U.S. 70, 77 (1973); *see Garrity* v. *New Jersey,* 385 U.S. 493 (1967); *Spevack* v. *Klein,* 385 U.S. 511 (1967).

We now alter what we said concerning the remaining issue, the right to counsel, confined to a situation where future prosecution is contemplated. Again the *Wolff* ruling does not directly apply. This particular problem is more akin to that presented in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), where the Court was concerned with "circumstances surrounding in-custody interrogation [which] can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators." 384 U.S. at 469-70.

*Mathis, supra,* applied *Miranda's* reasoning to those already in prison. It follows, therefore, that the *Miranda* solution must be foremost in the minds of prison administrators. They must make it quite clear to an inmate who is under threat of criminal prosecution that while he has a due process right to speak, he is under no compulsion to do so. If the inmate chooses to remain silent, he must not be questioned further. Moreover, in cases where criminal charges are a realistic possibility, prison authorities should consider whether defense counsel, if requested, should not be let into the disciplinary proceeding, not because *Wolff* requires it in that proceeding, but because *Miranda* requires it in light of future criminal prosecution.

As to the necessity for providing counsel or permitting retained counsel in disciplinary proceedings where no further criminal process is anticipated, *Wolff* indicates that the only requirement is for counsel substitute where the inmate is illiterate or incapable of adequately presenting his case. 42 U.S.L.W. at 5200. The *Morris* rules provide for such counsel substitute in all disciplinary cases where the inmate has requested it. We amend our prior opinion to the extent that we found a denial of due process in refusing access to retained counsel within the disciplinary hearing, 487 F.2d at 1292. We now affirm the district court's ruling on this point.

***The judgment is affirmed in part and reversed in part; the matter is remanded to the District Court for further proceedings consistent with our amended opinion.***